IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 324.

NORFOLK AND WESTERN RAILWAY COMPANY and WABASH RAILROAD COMPANY,
Appellants,

vs.

MISSOURI STATE TAX COMMISSION; Hunter Phillips; Howard J. Love; J. Ralph Hutchison, Members of the Missouri State Tax Commission, and J. R. Towson, Secretary of the Missouri State Tax Commission,
Appellees.

On Appeal from the Supreme Court of Missouri.

BRIEF FOR APPELLEES.

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OPINIONS BELOW.

The opinion of the Missouri State Tax Commission (A. 52) is not officially reported.* The Circuit Court of Cole County, Missouri, did not render an opinion. The opinion of the Supreme Court of Missouri (A. 69) is not yet reported.

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on December 30, 1966 (A. 68). A timely motion for rehearing was denied on February 13, 1967 (A. 2). A notice

* Citations to the portions of the record that are reprinted in the appendix are cited (A. 1, et seq.); citations to other parts of the record are cited (R. 1, et seq.). References to Appellants' Brief are designated (B. 1, et seq.).

of appeal to this Court was filed in the Supreme Court of Missouri on May 9, 1967 (A. 2). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(2). This Court noted probable jurisdiction on October 9, 1967. The appellees raised a question of jurisdiction in their motion to dismiss or affirm. In light of the Court's action on that motion, it is assumed that the Court does not want any further argument on the jurisdiction question and, therefore, appellees will make none. However, this Court has said in U.S. v. Green, 350 U.S. 415, (1955), that a question of jurisdiction should be reasserted. Therefore, appellees again point out that the appellants have speeifically stated they are not attacking the constitutionality of the Missouri laws (A. 78). If this be true, and from their brief it appears that it is, then a constitutional question pursuant to 28 U.S.C., Section 1257(2), has not been raised by appellants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Article I, Section 8, clause 3, of the United States Constitution provides:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *"

The XIV Amendment, Section 1, of the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

Section 151.060(3), of Revised Statutes of Missouri (1959)*, provides in its part most pertinent to this case:

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* All statutory reference herein refer to the Revised Statutes of Missouri, 1959, and Vernon's Annotated Missouri Statutes (V.A.M.S.).

"In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall not be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such railroad company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company."

QUESTIONS PRESENTED.

This case involves the validity of an assessment made by the Missouri State Tax Commission in accordance with Section 151.060 which prescribes a formula for assessing the rolling stock of interstate railroads for the purposes of ad valorem taxation. This formula, sometimes called the mileage or trackage formula, apportions to Missouri that portion of the entire value of all of the rolling stock of such railroads on the ratio of miles of road operated in Missouri to the railroads' total road mileage. On October 16, 1964, appellant Norfolk & Western became lessee of all of the properties of appellant Wabash which had tracks and operations in Missouri which Norfolk theretofore had not. For the following year, as of January 1, 1965, an assessment was made against Norfolk & Western by applying to the value of the entire Norfolk & Western fleet, owned and leased, the ratio of the leased mileage in Missouri to the total Norfolk & Western mileage.

The questions presented are these:

1. Whether the mileage or trackage formula provided for in Section 150.060(3) resulted in a grossly excessive valuation by the Missouri State Tax Commission of appellant Norfolk & Western's rolling stock in Missouri on January 1, 1965, in violation of the due process clause of the XIV Amendment of the Constitution of the United States or the commerce clause, Article I, Section 8, thereof.

2. Whether the appellants have shown by clear and cogent evidence that the assessment made by the Missouri State Tax Commission on January 1, 1965, against appellant Norfolk & Western is grossly excessive and in violation of the due process clause of the XIV Amendment of the Constitution of the United States or the commerce clause, Article I, Section 8, thereof.

STATEMENT.

The State Tax Commission of Missouri has the exclusive power of original assessment of railroads, railroad cars and rolling stock, Section 138.420(1). Section 151.010 subjects to taxation by the State of Missouri "* * * all real property, tangible personal property, * * * owned, hired or leased by any railroad company or corporation in this state, * * *". "In assessing, adjusting and equalizing any railroad property . . . the state tax commission may arrive at its finding, conclusion and judgment, upon its knowledge or such information as may be before it, and shall mot be governed in its findings, conclusions and judgment by the testimony which may be adduced, further than to give to it such weight as the commission may think it is entitled to; provided, that when any railroad shall extend beyond the limits of this state and into another state in which a tax is levied and paid on the rolling stock of such road, then the said commission shall assess, equalize and adjust only such proportion of the total value of all the rolling stock of such rail-

road company as the number of miles of such road in this state bears to the total length of the road as owned or controlled by such company." Section 151.060(3).

Appellants Wabash Railroad Company and Norfolk & Western Railway Company entered into a lease effective October 16, 1964, whereby Norfolk & Western leased all of the properties of Wabash under a long term lease. As part of the payment due under the lease, Norfolk & Western is to pay all taxes on the leased property. Prior to the lease, Norfolk & Western had no tracks in Missouri and did not operate in this state (A. 5).

Thereafter, pursuant to statute and using the statements required to be furnished by all affected railroads, the Commission notified Norfolk & Western that its assessment for 1965 taxes on its properties was $31,298,939.00. This amount includes an assessed value for roadbeds in the amount of $11,677,875.00; for buildings in the amount of $499,722.00; and, for rolling stock in the amount of $19,981,757.00, less $860,415.00 which is deducted by the Commission as an economic factor, which factor is allowed all railroads in varying amounts (A. 5-6).

This assessment was made against Norfolk & Western as lessee of the property being assessed. No assessment was made against Wabash (A. 5; 53).

The assessment of the rolling stock leased by Norfolk & Western was made in accordance with Section 151.060(3), in that the Commission determined the assessed value of the entire rolling stock of Norfolk & Western wherever situated to be in the amount of $513,309,877.00. This was arrived at as in all other railroad assessments made by the Commission by taking the original cost of the equipment by the year of acquisition and allowing five per cent depreciation per year but with a maximum depreciation of seventy-five

per cent of the original cost. Thereafter, as in the case of all railroad assessments for the year 1965, a factor of forty-seven per cent was applied by the Commission, resulting in the figure of $241,255,643.00.

The Commission then determined that 8.2824 per cent of all the main and branch line tracks owned or leased everywhere by Norfolk & Western were leased, owned or controlled by Norfolk & Western in Missouri. This percentage of the depreciated and equalized value of the entire amount of Norfolk & Western's rolling stock was determined to be $19,981,757.00 (A. 5-6; 52-57).

No question has been raised concerning the valuation placed upon the leased roadbeds or buildings. Nor do appellants question the total valuation placed upon the rolling stock of Norfolk & Western, wherever located, the method of depreciation and equalization, nor the trackage percentage used to apportion the rolling stock.

The only question raised is whether under special circumstances allegedly present in this case, the valuation determined by the statutory formula fairly reflected that portion of Norfolk & Western's rolling stock subject to taxation in this state.

At the hearing before the Commission appellants presented evidence tending to show that a large portion of the new rolling stock, consisting of expensive equipment used for its coal hauling operations in the eastern portion of the country, did not enter the State of Missouri and acquired no situs in this state. Using the mileage apportionment formula under these circumstances, it was contended, constitutes taxation of property not within the state's jurisdiction and in violation of the due process amendment and commerce clause in the Federal Constitution.

The Commission found against appellants, holding among

other things, that "the evidence adduced by appellants does not show that the valuation placed upon the rolling stock of petitioner was grossly excessive nor that such assessment resulted in an unlawful or unconstitutional taxation of any property of petitioner, nor does the evidence adduced by the petitioner show that in applying the formula herein indicated that the Commissioner acted in an unlawful, improper, arbitrary or capricious manner." (A. 57).

The Commission's Findings were affirmed upon appeal by the Circuit Court of Cole County and again by the Supreme Court of Missouri (A. 67, 68).

ARGUMENT.

I.

The mileage or track formula of Section 151.060(3), as applied to appellant Norfolk & Western, allocated a reasonable value of appellant's rolling stock to Missouri on January 1, 1965.

A.

The Mileage Formula is a valid method for allocating value.

The assessment of appellant Norfolk & Western's rolling stock in this state on January 1, 1965, was made according to the authority of Section 151.060(3). Appellants do not question the valuation placed upon fixed property by appellees. Nor do they question the total valuation placed upon Norfolk & Western, the method of depreciation or the 47 per cent factor which the appellees used to adjust and equalize the assessed valuation placed upon the property. Appellants have not alleged that the formula was mis-applied, but rather admit that it was properly applied (B. 35). The direct question then concerns the validity of the formula and allocation of value thereunder.

It can hardly be questioned that the State of Missouri does have the power to impose an apportioned tax upon the value of rolling stock of an interstate railroad found habitually in the state. **Central R. R. v. Pennsylvania,** 370 U.S. 607 (1962); **Pullman's Palace Car Co. v. Pennsylvania,** 141 U.S. 18 (1891); **Maryе v. Baltimore & O.R.R.,** 127 U.S. 117 (1888). This Court explained the reason for such authority in **Johnson Oil Refining Co. v. Oklahoma,** 290 U.S. 158, 162.

> "The basis of the jurisdiction is the habitual employment of the property in the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the

State is subject. When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the naure of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. (Citations)"

The Supreme Court of Missouri has recognized and followed the dictates of **Johnson Oil Refining Co. v. Oklahoma**, supra, in **St. Louis Southwestern Ry. Co. v. State Tax Commission**, (Mo. 1959), 319 S.W.2d 559, 561, wherein it stated:

"* * * However, Missouri does not use the 'average number of units' formula, but instead uses a formula based on the ratio of number of miles of road in this state to the number of miles of road in all states. This method of assessment has also been judicially approved when the result is fair. * * *"

Citing **Pullman's Palace Car Co. v. Pennsylvania**, 141 U.S. 18. The Supreme Court of Missouri has also recognized that the mileage formula can give unfair results and in **St. Louis Southwestern Ry. Co. v. State Tax Commission**, supra, p. 561, stated:

"* * * But it is clear that under particular factual situations this formula can result in unfair and unrealistic taxation, and this method was held invalid in at least one situation where the application of the formula resulted in a valuation for tax purposes far in excess of the value of the average number of units present in the state. * * *"

Citing **Union Tank Line Co. v. Wright**, 249 U.S. 275, as one of the authorities.

The faults of the mileage formula which can result in an unfair assessment, against which this Court has consistently warned, are well recognized by the Supreme Court of Missouri and appellees.

When the mileage formula has been improperly and routinely applied what factual circumstances have been present? Generally, the tax has been measured by a method other than the total depreciated, equalized value of the taxpayers' rolling stock. The Missouri law requires, in the situation of an interstate railroad, that the method of valuation be the total depreciated, equalized value allocated by the mileage formula. Section 151.060. However, cases in which this Court has struck down invalid assessments generally fall into two methods of total valuation as illustrated by **Fargo v. Hart**, 193 U.S. 490 (1904), and **Wallace v. Hines**, 253 U.S. 66 (1920).

In **Fargo v. Hart**, supra, the State of Indiana had authorized tax on the property of express companies. The Indiana Tax Commission attempted to set the total valuation by all assets wherever located. The express companies objected upon the grounds that some of the assets so included were not related to the express companies' business in Indiana and the Court agreed. The Court, speaking through Mr. Justice Holmes, confirmed the mileage formula and organic value and then stated, l.c. 501:

> "* * * We have explained why, in our opinion, this cannot fairly be treated as a mere case of overvaluation, but is an assessment made upon unconstitutional principles. * * *"

The principle is thus established if the total valuation is excessive, allocation or proportion by the mileage formula

is inherently defective, not because of the formula but rather because of the excessive total valuation. An assessment based upon a fact situation similar to **Fargo v. Hart** is unconstitutional; however, in the instant case appellants have not challenged the total valuation, only the results of the mileage formula.

The second method of valuation that has produced defective assessments is illustrated by **Wallace v. Hines**, supra. In the **Wallace** case North Dakota had authorized an excise tax on railroads, the total to be measured by the taxpayers' entire stock and bond issue. The taxpayer was in possession of bonds secured by a mortgage on land outside of North Dakota and objected to the assessing of these bonds. The North Dakota law also provided for a mileage formula for interstate railroads. Again, Mr. Justice Holmes, speaking for the Court (253 U.S. 66, 69-70), confirmed the mileage formula, organic value, and stated:

> "* * * Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. * * *"

The error in the **Wallace** case was again in the total valuation, which in the instant case appellants have not questioned.

To distinguish the excessive total valuation cases, as represented by **Fargo v. Hart**, supra, a different and more applicable problem is illustrated by **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919). In the **Union Tank Line** case the State of Georgia authorized a property tax and a franchise tax on railroads. The property tax was to be assessed on total valuation of the rolling stock operated in the state. Valuation on interstate railroads was to be allocated by the

mileage formula. The Georgia Comptroller General assessed the taxpayer, who thereupon objected on the basis that the assessment was in excess of the actual number of cars in the state by 350. This Court, speaking through Mr. Justice McReynolds (249 U.S. 275, 282, 283), again confirmed organic value, the general theory of the mileage formula, but in so doing criticized its application in the case because of the great disparity between the value of the actual number of cars, $47,310.00, and the assessed value, $291,196.00 (249 U.S. 275, 283). This Court also noted that the rule in **Fargo v. Hart**, 193 U.S. 490, did not apply, which appears to us to distinguish between excessive valuation assessments and indiscriminate application of the mileage formula, or unit rule as it is referred to in the **Union Tank Line** case.

B.

The mileage formula did not allocate an unreasonable or grossly excessive value to appellees.

What precisely do appellants urge to demonstrate that the assessment is "gross excessiveness"? **Union Tank Line Co. v. Wright**, 249 U.S. 275, 282. They assert that compared with the last assessment, prior to the lease, Wabash was assessed at approximately one half of this assessment, but then criticize the Missouri Supreme Court for making a similar comparison (B. 42). The facts are uncontroverted as to the present and immediately past assessments. Prior to the lease, Wabash was assessed $10,103,340.00 on a total depreciated, equalized rolling stock value of $82,456,813.00. In the next succeeding assessment appellant Norfolk & Western was assessed $19,981,757.00 on a total depreciated, equalized rolling stock value of $241,255,643.00.

While appellants state that the challenged assessment is disproportionate by nearly 3 to 1 (B. 41) they failed to point out that this Court does not regard approximately 3 to 1 as being grossly excessive. In **Nashville, C. & St. L. Ry. v.**

Browning, 310 U.S. 362, 366, this Court sustained such an assessment for property taxes against the railroad. In so holding, this Court distinguished **Union Tank Line Co. v. Wright**, 249 U.S. 275; **Wallace v. Hines**, 253 U.S. 66 (1920); and **Southern Ry. v. Kentucky**, 274 U.S. 76 (1927), on the grounds that (310 U.S. 362, 366):

> "* * * Wherever the state's taxing authorities have been held to have intruded upon the protected domain of interstate commerce in their use of a mileage formula, the special circumstances of the particular situation, in the view which this Court took of them, precluded a defensible utilization of the mileage basis.* * *"

Appellants have not shown the gross excessiveness of (600%) of **Union Tank Line**; excessive total valuation of **Wallace v. Hines**; or, gross excessiveness of **Southern Ry. v. Kentucky**. Even if appellants are heard to urge the 3 to 1 disparity, that is not grossly excessive in the light of enhanced value.

C.

The organic relationship of appellants' rolling stock habitually found in Missouri contributes to the value of the Norfolk & Western System.

> "While the valuation must be just it need not be limited to mere worth of the articles considered separately but may include as well the intangible value due to what we have called the organic relation of the property in the state to the whole system." **Union Tank Line Co. v. Wright**, 249 U.S. 275, 282 (1919).

Appellants attack the opinion by the Supreme Court of Missouri in its holding below concerning enhanced value (B. 30, 31). Appellants urge that the Missouri law is not the kind of statute that can reach enhanced value (B. 3). This is because the Missouri statutes are "horse and wagon"

statutes, appellants said, relying on Adams Express Co. v. Ohio State Auditor, 166 U.S. 185 (1897), (B. 34). The point being made by this Court in the Adams Express Co. case, speaking through Mr. Justice Brewer, is that a general tax on horses and wagons is to be distinguished from a property tax specifically on express companies. That Section 151.010, et seq., is a tax specific on railroads can hardly be debated.

Appellants contend that while the mileage formula as applied in many cases (B. 32, 33) does reach enhanced value, the Missouri law cannot because it is different. How different is the Missouri law? In comparing the authority of Section 151.010, et seq., with three of the cases appellants say do reach enhanced value, it is obvious that there is no difference between them and the Missouri law. Appellants say (B. 33) Pullman Co. v. Richardson, 261 U.S. 330 (1923); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897); and, Cleveland, C.C. & St. L. Ry. v. Backus, 154 U.S. 439 (1894), all have mileage formulas that do reach and assess enhanced value. All of these cases involve a property tax upon the total valuation of the taxpayer and allocation by a mileage formula. No valid distinction can be made because one method or another is used to reach a total valuation of the property upon which the tax is assessed. **Pullman Co. v. Richardson,** 261 U.S. 330, 339 (1923). There is nothing to distinguish the Missouri law from the cases cited by appellants. The Missouri law is intended to take enhanced value into consideration, and the Supreme Court of Missouri has so held below (A. 83).

Appellants have also urged that enhanced value should be computed separately and added into the total valuation (B. 34) and that even if the Missouri law does contemplate enhanced value, it is inconsistent with the facts shown (B. 38, 39). Nowhere in any case has any property tax authority applied a separate computation to determine en-

hanced value on rolling stock. The very nature of enhanced value defies such a determination. **Cleveland, C.C. & St. L. Ry. v. Backus**, 154 U.S. 439, 445 (1894). In asserting that enhanced value cannot support the assessment, appellants have contended that they can show that only three per cent of their rolling stock valuation was habitually in Missouri but they were taxed on eight per cent (B. 31). By their own admission then the alleged disparity is five per cent, a figure that is reasonable even in the absence of enhanced value which certainly should increase when the system's total depreciated, equalized valuation is increased from $80,000,000.00 to $200,000,000.00 after the effective date of the lease. Can this court, or any court as a matter of law, find that alleged five per cent disparity is grossly excessive? Appellees do not think so, and appellants have shown no authority supporting such a finding.

Appellants have also asserted generally throughout that Norfolk & Western's operations are unique in its coal hauling aspects (A. 15-16). That rolling stock so used will never enter Missouri and that therefore it should not be taxed, appellants agree. Units not habitually found in Missouri are not taxed, and indeed cannot be taxed. **Union Tank Line Co. v. Wright**, 249 U.S. 275 (1919). Appellants are apparently urging that these coal hauling units are not a part of the system for the purpose of valuation in the sense that the bonds were excludable in **Wallace v. Hines**, 253 U.S. 66 (1920), and the assets in **Fargo v. Hart**, 193 U.S. 490 (1904). This is a very curious position taken by appellants. On one hand they assert the vital importance the coal hauling has to the Norfolk & Western system (A. 15-16) and on the other hand maintain it has no relation to the value of the system (B. 40), but yet do not challenge the total depreciated, equalized valuation of rolling stock. Such a position would be analogous to the factual situation in **Wallace v. Hines**, supra, and **Fargo v. Hart**, supra, where the taxpayer did not chal-

lenge the total valuation as being excessive but only attacked the application of the mileage formula. Such a position taken by appellants can only be sustained if they can show that the coal hauling units are not a part of the system and have no relation to the enterprise, and they have not done this. The disproportion in **Wallace v. Hines** and **Fargo v. Hart** resulted from an inclusion of assets in measuring the total valuation that had no direct relation to the system or enterprise in the taxing authorities' state. Any mileage formula will inherently produce an excessive assessment if the total valuation is excessive, and the result is not an over-valuation, but an unconstitutional principle. **Fargo v. Hart,** 193 U.S. 490 (1904).

II.

Appellants have failed to show by clear and cogent evidence that the assessment is so grossly excessive that it results in taxing property not having a situs in Missouri.

Appellees have demonstrated in Point I. B. in an affirmative manner that the assessment is not grossly excessive. However, the burden is upon the appellants to show such excessiveness, **Norfolk & Western Ry. v. North Carolina ex rel. Maxwell,** 297 U.S. 682, 685 (1936), by clear and cogent evidence. **Butler Gros. v. McColgan,** 315 U.S. 501 (1942). Appellants have wholly failed to bear the burden of showing that this assessment is grossly excessive.

In allocation of value to the taxing state, absolute accuracy is not necessary and, in fact, usually impossible. Therefore, at best, allocation by mileage formula is an estimate, but nevertheless, valid in the absence of gross disparity. **Union Tank Line Co. v. Wright,** 249 U.S. 275 (1919), and **Pullman Co. v. Richardson,** 261 U.S. 330 (1923). Appellees, by virtue of Section 151.060(3), are mandatorily required to administer that law, including the mileage formula, uniformly and routinely, unless the result is plainly excessive.

Even assuming for the purpose of argument that the difference in value between what appellants say (three per cent) and what the mileage formula produces (eight per cent) is true, can a five per cent disparity be grossly excessive? Appellees urge that the assessment is reasonable and substantial enhanced value accrued when the Wabash rolling stock became part of the Norfolk & Western system. But even if the alleged five per cent disparity is true, it is not by any authority what is contemplated by the term "grossly excessive." The clearly inflated assessment present in **Union Tank Line Co.** is not found in the instant case. It is of no import for appellees to argue the principles of **Fargo v. Hart** and **Wallace v. Hines** because contrary to appellants urging (B. 39), the problem here is whether or not allocation of value by the mileage formula bears a reasonable relationship to the valuation of the number of units or rolling stock in Missouri. This is not a question of excessive total valuation.

This Court has not issued percentage boundaries the exceeding of which will be excessive. But this Court has said that the difference between $80,000,000.00 and $22,000,000.00 is not excessive, **Pittsburgh, C.C. & St. L. Ry. v. Backus,** 154 U.S. 421 (1894); that $16,000,000.00 as opposed to $23,000,000.00 is not excessive, **Nashville, C. & St. L. Ry. v. Browning,** 310 U.S. 362 (1940); and, .6 per cent as opposed to 1.7 per cent is not excessive in **Railway Express Agency v. Virginia,** 358 U.S. 434 (1959).

If the tax assessment herein challenged is fairly apportioned to the commerce carried on within the State of Missouri, both the commerce clause and due process are satisfied. **Ott v. Mississippi Valley Barge Line Co.,** 336 U.S. 169 (1949).

Appellants have not shown by clear and cogent evidence that the allocation by mileage formula has resulted in an

unfair apportionment and therefore must fail on this issue.

III.

The issue of double taxation raised by appellants is wholly without merit.

Appellants have raised the question that they may be subject to the risk of double taxation because of the application of the mileage formula. Their contention is based on the argument that the same property may be taxed by Missouri and other states. This claim does not amount to double taxation. Double taxation in the objectionable or prohibited sense is taxing by the same taxing authority, the same property twice, in the same period, for the same purpose. 84 C.J.S., Taxation, Section 39, pp. 131, 132.

The taxation of property which is within the jurisdiction of the state, at least during a portion of the taxing period, is not rendered objectionable as double taxation by the fact that the same property is, or may be, also assessed for taxation in another state. **Northwest Airlines v. State of Minnesota,** 322 U.S. 292 (1944).

Furthermore, even if there was double taxation, the Federal Constitution does not prohibit or prevent the states from imposing double taxation. **Swiss Oil Corporation v. Shanks,** 273 U.S. 407, 413 (1927), and **Kirtland v. Hotchkiss,** 100 U.S. 491, 498 (1879). In **Illinois Cent. R. Co. v. State of Minnesota,** 309 U.S. 157, 164 (1940), the court said:

> "Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the 'Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds.'" Citing **Ft. Smith Lumber Co. v. Arkansas ex rel. Arbuckle,** 251 U.S. 532, 533 (1920).

CONCLUSION.

The Missouri State Tax Commission has fairly apportioned the total depreciated, equalized valuation of Norfolk & Western's rolling stock and the allocation of value to the State of Missouri meets the standards of the commerce clause and due process.

The judgment below should be sustained.

Respectfully submitted,

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